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No. 91-517

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,

Respondents,

vs.

FRANK FORREST, et al.,

Petitioners.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly hold that the private members of the Washington State Apprenticeship and Training Council may not be responsive to state policy and therefore should be subject to active state supervision in order to exempt their price-fixing activities from antitrust liability?

2. Does the Court of Appeals decision that price-fixing activity by private members of the Washington State Apprenticeship and Training Council may have resulted from private rather than public agendas and should therefore be subject to the two-part immunity test of *Patrick v. Burget*, 108 S. Ct. 1658 (1988), conflict with this Court's decision in *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344 (1991) that a municipality is not subject to a conspiracy exception?

3. Even if *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344 (1991) were applicable to the facts of this case, has the Washington State legislature affirmatively expressed a clearly articulated state policy authorizing the private members of the Washington State Apprenticeship and Training Council to require nonunion employers to pay union wage rates to apprentices on private construction?

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STATEMENT OF THE CASE

Respondents wish to correct the Statement of the Case set forth in the Petition for Writ of Certiorari in the following respects. This antitrust action brought by "nonunion" or "merit shop" employers and employer organizations against members of the Washington State Apprenticeship Training Council ("Council") is not part of a long-running effort to undercut effective regulation of apprenticeship training. Respondent contractors have fought this eight-year battle to obtain state approval of their apprenticeship training programs. They also seek to train apprentices on state public works projects. In 1985, when discovery was concluded in this case, there were only two nonunion apprenticeship training programs out of 99 approved construction programs in the entire State of Washington. This abysmal record is the result of the following restraint of trade.

A. Nature of Restraint.

The method for restraining merit shop contractors from participating in the state approval system and state and public works has been a simple and ingenious one. Prior to 1978, the Council had an outright ban on nonunion or parallel training programs. In response to pressure from the federal Department of Labor, Council members substituted the regulation which is the subject of this action. According to that regulation, all apprenticeship program sponsors had to agree to pay the same wage rates as existing programs in order to obtain

state approval of those programs.[1] Since all of the programs in existence were union programs, the regulation required nonunion program sponsors to pay union wage rates to their apprentices regardless of the pro or anti-union beliefs of those apprentices and regardless of the actual wage rates of the employer. Since public works wage rates for both journeymen and apprentices were and are set by the Industrial Statistician for the State of Washington and not the Council, this price-fixing scheme was also expressly limited in application to private construction where no public funds were involved.

This regulation has been devastatingly effective in keeping open shop contractors from training under the auspices of the State for the simple reason that the Council members exacted a high price from those contractors who wished to train. In order to obtain state approval, open shop employers had to agree to pay union wage rates to apprentices on private works. This would render the open shop employer uncompetitive with other open shop contractors based upon the absence of control over the labor component of their bid. It would also clearly reduce

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[1]Wash. Admin. Code § 296-04-270 (1978) stated in relevant part, "In the event an apprenticeship program is proposed for an area already served by an apprenticeship program, the new program's wage scale shall be identical to or greater than that of an existing program." (See Appendix A which sets out the provision in its entirety.) This regulation was modified in 1986 to require payment of a wage scale equal to or greater than 80% of the applicable state prevailing wage.

the ability of the open shop contractor to compete against union contractors. In essence, in order to obtain state approval, contractors were required to surrender control over wages to the Council which, in turn, surrendered it to unionized private parties engaged in collective bargaining.

In their Petition, Council members argue that state approval of training programs is voluntary and that nonunion contractors therefore could escape this restraint of trade. However, a nonunion employer who does not obtain state approval of its training program is effectively restrained in another area -- public works. In order to encourage employers to bring their training programs to the Council for approval, the Washington State legislature created a powerful financial inducement. All employers who obtain state approval of their training programs may pay apprentice wage rates to apprentices on public works jobs; all others must pay their apprentices full journeyman wage rates as set by the Industrial Statistician.[2]

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[2]Wash. Rev. Code § 39.12.021 provides: "Prevailing rate to be paid on public works--Apprentice workers. Apprentice workers employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to Chapter 49.04 RCW, must be paid at least the prevailing rate for an apprentice of that trade. Any worker for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journey level worker, and, therefore, shall be paid at the prevailing hourly rate for journey level workers."

As a result, absent state approval, employers are uncompetitive on prevailing wage work. The private members of the Council therefore created a double-bind for the open shop contractor -- either agree to pay union wage rates on all works, private or public, or remain uncompetitive on public works contracts.

What is the alleged basis for the Council's restraint of full and fair competition in the fixing of apprentice wage rates? There is no state statute which directs the Council to fix apprentice wage rates, much less one that requires that union wage rates or prevailing wage rates be paid on private works in order to protect apprentices against economic exploitation. To the contrary, the state statutes expressly direct the Council and its director to "encourage and promote the making of apprenticeship agreements." Wash. Rev. Code § 49.04.030. This state policy of encouraging apprenticeship agreements is also expressed in legislation which gives contractors who train, the ability to pay apprentice wage rates on public works. Wash. Rev. Code § 39.12.021.

B. **Nature of Private Actors.**

The Council is comprised of private representatives of organized labor and management.[3] These private

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[3]The Council is comprised of "three representatives each from employer and employee organizations, respectively, who are appointed by the Director of the Washington State Department of Labor and Industries." Wash. Rev. Code § 49.04.010. The Director and a

individuals continue to hold full-time jobs with their respective unions or businesses and meet only on a quarterly basis. For these quarterly meetings, the individuals receive travel expenses and $25 per day. The labor representatives are nominated for appointment by their respective labor organizations. The employer representatives are business owners who compete with the employers who come before them.

The price-fixing regulation at issue was authored by a union representative on the Council with the assistance of a union attorney. Shortly after its passage, the regulation was attacked by the State Attorney General's office[4] and the federal Director of the Federal Bureau of Apprenticeship Training or "BAT."[5] In addition, members of the Council attacked the use of this price-fixing regulation to prevent state approval of open shop apprenticeship programs. One member stated that ". . . the Council has been used as an organizing tool for unions, which was not its function." The former chair of the Council stated that ". . . the members on the Council

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seventh, public, member are appointed by the Governor.

[4]According to an Attorney General Memorandum dated May 28, 1981: "There is no clear reason why this regulation is necessary. It appears to be an antitrust violation and beyond the council's powers."

[5]In a letter dated September 10, 1991, the Director stated in part that the regulation is "contrary to the [apprenticeship] act."

serve private interests." Pursuant to this price-fixing activity, the Council placed the setting of apprentice wages in the hands of private parties who were subject to no supervision by the Council. As the former chair stated:

> . . . [I]t is the Council members representing private interests that pass or reject a program. Even a program which the Assistant Director recommends disapproval of, will come before the Council and the Council may pass that program. By the same token, there have been numerous instances where the Assistant Director has recommended approval of a program and it has not been passed. There is no veto power by the Assistant Director to insure that a program complies with state policy. There is specifically no instance that I am aware of that [the Assistant Director] recommended approval or rejection based upon the apprentice wage rate being too high or too low. Either the proposed program's wage rate matched or exceeded the union wage rate or it did not.

The Court of Appeals for the Ninth Circuit has had three opportunities, and this Court has had an opportunity as well, to adopt the "municipality" analysis Petitioners advocate in their Petition. Under this one-step analysis, the reviewing court could have determined that the private members of the Council were like a municipality and that the price-fixing conduct was the result of a clearly

articulated and affirmatively expressed state policy. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). Neither court has done so. Indeed, this Court previously ordered the Court of Appeals to review this case "for further consideration in light of *Patrick v. Burget*." *Washington State Electrical Contractors, et al. v. Forrest, et al.*, 109 S. Ct. 38 (1989). The trial court refused to do so. On appeal, the Court of Appeals reversed the trial court ruling and requested the following:

> On remand, the District Court should make specific findings and conclusions on both prongs of the immunity test most recently set out in *Patrick*.

It is this decision, coupled with the Court of Appeals' ruling that the private members of the Council may have a private, rather than a public, agenda and therefore may not be subject to antitrust exemption as a state agency, which is before this court.

RESPONSE TO PETITION FOR WRIT

A. The Court of Appeals Correctly Determined That the Private Members of the Council May Be Subject to a Private Rather Than Public Agenda and Therefore May Not Be Subject to Antitrust Exemption as a State Agency.

The Court of Appeals determination that the anticompetitive acts by Council members may be the result

of private, rather than public agendas, is supported by the following undisputed facts. First, pursuant to state law, Council members are private representatives of employer or employee organizations. Wash. Rev. Code § 49.04.010. These representatives continue to carry out their responsibilities as union organizers or contractors and the inducement for advancing private, as opposed to public, interest is therefore very strong. These Council members, who are appointed by a non-elected official, regulate the apprenticeship training programs of their competitors.

Second, Petitioners presented no evidence that the representatives of labor organizations and private employers who sit on the Council are required by statute, regulation or practice to ignore their private interests. Drafting, passage and implementation of the regulation at issue is a perfect illustration of how Council members advanced their private interests. The Council member who authored the regulation requiring all apprenticeship program sponsors to pay union wage rates on private works was employed by the electricians' union. He drafted the regulation with the backing of the union and the use of the union's attorney. The regulation clearly advanced the interests of the union.

There is no evidence that, prior to the regulation's implementation, the regulation was reviewed by any state actor to ensure that the union's interests coincided with the interests of the state. Moreover, it is undisputed that, pursuant to this regulation, the union wage rates which set the apprentice wage rates were never monitored by Council members. Sworn statements by Council members

underscore the fact that private interests guided the price-fixing activity of the Council members. One Council member later stated, ". . . I felt this type of regulation was turning the Council into an 'organizing tool for labor and that the people of the state were suffering' or similar wording."

An eight-year member of the Council and its former Chair stated as follows:

> In sum, the members on the Council serve private interests. The Council is not subject to supervision by the state when those private interests do not coincide with the state's interests. As my letter of resignation indicates, I strongly see the need for additional public representatives so that the Council can no longer be controlled by organized labor. Program after program which should have been passed, has been turned down simply because it provides training for non-union apprentices. New reasons for rejecting such programs are being invented by Council members who do not want to expand training beyond the union sector of construction.

Based upon these undisputed facts, the Court of Appeals correctly held that the Council members may not be responsive to state labor policy and therefore should be subject to active state supervision.

Petitioners argue that there were and are sufficient safeguards to ensure that the private Council members were guided by public interest. This is an argument which should be made to the trial court under the second prong of the *Patrick* test to convince the court that these safeguards constituted actual, rather than potential, state supervision.[6] However, these alleged safeguards do not undermine the correctness of the Court of Appeals finding that the Council members may have been guided by self-interest.

Petitioners also claim that the Court of Appeals analysis would open all state regulatory boards to potential antitrust liability. This is nonsense. In the event the reviewing court determines there is little or no danger that private interests are controlling the price-fixing activity, then the agency or actor will enjoy the same antitrust protection as a municipality. Where, as here, such a finding cannot be made, the state must satisfy the *Patrick v. Burget* two-prong test in order to cloak private actors with state action immunity. This Court has repeatedly held that the fact that the regulatory agency or board is set up by state law is irrelevant to this inquiry. *See 324 Liquor Corporation v. Duffy*, 479 U.S. 335 (1987); *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985); *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980).

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[6]"The State does not actively supervise this restraint unless a State official has and exercises ultimate authority over private privilege determinations." *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988).

B. **The Court of Appeals Determination That the Council May Not Be Subject to the "Municipality" Antitrust Exemption Is Not In Conflict With *City of Columbia v. Omni Advertising*.**

The Petition is based upon a mischaracterization of the Court of Appeals decision and a misinterpretation of this Court's ruling in *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344 (1991).[7] The Court of Appeals for the Ninth Circuit correctly applied controlling case law since *Parker v. Brown*, 317 U.S. 341 (1943), to determine that the private Council members, unlike a municipality, might be guided by private interests and should therefore be required to demonstrate that their price-fixing activity was subject to active state supervision. This Court in *City of Columbia* reached a different issue. This Court held that a municipality which was subject to antitrust immunity could not lose that immunity based upon

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[7] It is clear that the Court of Appeals had a full opportunity to consider Petitioners' arguments regarding the applicability of *City of Columbia* to this case. The decision of *City of Columbia v. Omni Outdoor Advertising, Inc.* was handed down on April 1, 1991. Counsel for Petitioners sent a letter to the Court of Appeals regarding the decision on April 3. The Court's *per curiam* decision was filed on April 15, 1991. Petitioners filed a motion for reconsideration based largely upon the *City of Columbia* case on May 10, 1991. The panel denied the motion for reconsideration and rejected the application for rehearing *en banc* on June 24, 1991.

a "conspiracy exception" to such immunity. The *City of Columbia* analysis is therefore one step beyond the analysis the Court of Appeals applied in this case because in *City of Columbia*, the municipality was held to be subject to antitrust immunity. The Ninth Circuit Court of Appeals might have run afoul of the *City of Columbia* decision if it had found that Petitioners were subject to antitrust immunity as "state agents" and then determined that they lost that immunity by virtue of their conspiracy with private parties to keep merit shop contractors out of competition on private and public works. That is not, however, what the Court of Appeals ruled.

The Court of Appeals correctly applied the "state action" exemption analysis in this case. Pursuant to this analysis, the reviewing court must look at a variety of factors to insure that the private interests of private actors are not the basis for the anticompetitive acts. A state legislature or supreme court is automatically subject to the antitrust exception because it is, in essence, the state itself. A municipality must meet an additional hurdle. A municipality must demonstrate that it carried out its anticompetitive conduct pursuant to a clearly articulated and affirmatively expressed state policy. It requires no active state supervision since the danger of advancing private interests is absent:

> Nothing more is required to insure confidence that the acts of a municipality should be shielded as acts of the state, because a municipality lacks the attributes and incentives of private actors, and does

> not pose the danger of private price-fixing that the antitrust laws were intended to prevent.

Fuchs v. Rural Electric Convenience Co-Op, 858 F.2d 1210, 1214 (7th Cir. 1988); *see also Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

However, when examining private actors, the court will look for the danger that private -- not public -- interests might drive the anticompetitive acts. If so, then the following two-prong test is applicable: first, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the anticompetitive conduct must be actively supervised by the state itself. *See California Liquor Dealers v. Midcal Aluminum*, 455 U.S. 97 (1980). This two-part test is designed to insure that "private parties are carrying out the avowed policy of the state rather than abusing the state grant of authority to pursue their own ends." *Fuchs v. Rural Electric Convenience Co-Op*, 858 F.2d at 1215.

In order to determine whether the Council members in this case would, without active state supervision, carry out the interests of the state, the Court of Appeals correctly examined the potential motives of the Council members. The Court of Appeals held that "[t]he Council has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy." *Washington State Electrical Contractors v. Forrest*, 930 F.2d 736 (9th Cir.

1991). This holding was consistent with its prior ruling in this case that the one-part "municipality" analysis was not applicable since "we also perceive certain problems when a state agency is staffed with individuals who represent private interests." *Washington State Electrical Contractors v. Forrest*, 839 F.2d 547, 550 (9th Cir. 1988).

As a result, the two-part test of *Patrick v. Burget*, rather than the one-part test of *City of Columbia* is applicable. This Court's proscription on examination of private motives in the *City of Columbia* applied to a completely different issue under a completely different analysis.

C. Even If *City of Columbia* Applied In This Case, The Requisite Clearly Articulated State Policy Authorizing the Anticompetitive Conduct at Issue Is Absent.

Even if this Court likened the private Council members to a municipality for purposes of this appeal, application of the antitrust exemption discussed in *City of Columbia* is not automatic. The municipality in *City of Columbia* was required to show that the state clearly articulated a policy authorizing the anticompetitive conduct at issue. In *City of Columbia*, the policy was found in a zoning regulation which displaced unfettered private action in the area of billboard locations.

In this case, Petitioners cannot cite a similar state policy in favor of fixing apprentice wage rates on private works. Petitioners can point to no legislative authorization

for the Council or, more specifically, private parties engaged in collective bargaining, to establish apprentice wage rates on private works. Wash. Rev. Code § 49.04.050 merely states that the standards of apprentice agreements must include "[a] statement of the progressively increasing scale of wages to be paid the apprentice." The state legislature is silent as to who should determine the wage rate and what the level of that apprentice wage rate shall be. Federal legislature governing apprentice wage rates for federal apprenticeship programs sets no such minimum.

Even if there were express statutory authorization by the State of Washington requiring payment of union or prevailing wages to apprentices on private works, such a policy would be unenforceable based upon preemption of state regulation in the area by the National Labor Relations Act, 29 U.S.C. §151 *et seq.* and the Employee Retirement Income Security Act, 29 U.S.C. §1001, *et seq.* *See Boise Cascade Corporation v. Peterson*, 939 F.2d 632 (8th Cir. 1991) (state labor regulation specifying apprentice-journeyman ratio was preempted by ERISA); *Bechtel Construction v. Carpenters*, 812 F.2d 1220 (9th Cir. 1987) (state regulation requiring state-approved wage rates for apprentices was preempted by NLRA); *Associated Builders & Contractors v. Baca*, ____ F. Supp. ____, 1991 U.S. Dist. LEXIS 8929 (N.D. Ca. 1991) (city ordinance which required prevailing wages on private contracts was preempted by NLRA); *Associated Builders & Contractors v. MacDonald*, 731 F. Supp. 966 (D. Nev. 1989) (state law requiring BAT-approved program sponsors to pay journeyman wage rates on state

public works was unconstitutional and preempted by ERISA). As a result, Petitioners have not and cannot show the existence of a clearly articulated state policy which authorized their anticompetitive conduct.

CONCLUSION

On the basis of the facts and the inapplicability of the *City of Columbia* decision, Respondents respectfully request that the Writ of Certiorari be denied since the lower court decision is consistent with this Court's decisions.

RESPECTFULLY SUBMITTED this 23rd day of October, 1991.

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APPENDIX A

Wash. Admin. Code § 296-04-270 (1978)
Apprenticeship agreements--Types--Standards--Registration, review, cancellation, reregistration--Certificate of completion

(1) The following apprenticeship agreements shall be recognized pursuant to RCW 49.04.060:

(a) A written agreement between an association of employers and an organization of employees describing the conditions of training for apprentices.

(b) A written statement of an employer or a written agreement between an employer and an employee organization describing the conditions of training apprentices. The former agreement shall be recognized only if there is no bona fide employee organization in the plant affected by the agreement.

(c) A written agreement between an employer and an individual apprentice describing the conditions of apprenticeship.

(2) Apprenticeship agreements shall conform to the following standards:

(a) Committee programs, plant programs, and on-the-job training programs must contain the provisions required by RCW 49.04.050 and, in addition, shall contain:

(i) Provision for nondiscrimination in the selection of apprentices in substantially the following form:

Each sponsor of an apprenticeship program shall include in its standards the following equal opportunity pledge: "The recruitment, selection, employment and training of apprentices during their apprenticeship shall be without discrimination because of race, color, religion, national origin, or sex. The sponsor will take affirmative action to provide equal opportunity in apprenticeship and will operate the apprenticeship program as required by the rules of the Washington State Apprenticeship and Training Council and Title 29, Part 30 of the Code of Federal Regulations."

(ii) Provision that there shall be no discrimination on the basis of race, color, creed, sex. or national origin after selection during all phases of employment during apprenticeship.

(iii) Provision that adequate records of the selection process must be kept for a period of at least five years and will be made available to the council or its designated representative on request. Such records must include a brief summary of any interviews and the conclusions reached on each of the specific factors which are part of the total judgment concerning each applicant.

(iv) Provision for local committee rules and regulations consistent with these rules and the applicable apprenticeship agreement.

(b) Any proposed standards for apprenticeship must be substantially similar to any standards for apprenticeship already approved by the council for the industry, craft or trade in question to the end that there is general statewide uniformity of such standards in each industry, trade or craft.

(c) The statement of the progressively increasing scale of wages (RCW 49.04.050(5)) shall provide that the entry level wage for all apprentices shall be at least a percentage of the journeymen scale set by the applicable collective bargaining agreement or at least a percentage of the prevailing wage for the craft for the area set by the United States Department of Labor pursuant to the Davis-Bacon Act (40 U.S.C. §276) where no collective bargaining agreement is in effect. In the event an apprenticeship program is proposed for an area already served by an apprenticeship program, the new program's wage scale shall be identical to or greater than that of an existing program. In the event an apprenticeship program is proposed for a craft or area in which there is no collective bargaining agreement, no Davis-Bacon Act prevailing wage, and no existing apprenticeship program, the applicant shall request the statistician of the department of labor and industries set a prevailing wage for the specific area and craft to be incorporated into the proposed agreement.

(d) A sample apprenticeship agreement which the council approves is available on request from the supervisor.

(3) Registration, review, cancellation, reregistration.

(a) All individual agreements shall be registered with the supervisor and subject to his approval.

(b) The supervisor and his staff, in the performance of their field work, shall conduct a systematic review of all plant and committee programs and shall take appropriate action, including recommendation of cancellation, when they find that any program is not being operated according to these rules and regulations or according to its applicable standards.

(c) When any program is found to be operating in a manner inconsistent with or contrary to these rules and regulations or its established plant or committee program, the supervisor shall notify the offending committee, person, firm or agency of the violation. If the supervisor does not receive notice, within 60 days, of action taken to correct such violations, the supervisor may take whatever action he deems necessary, including recommendation of cancellation of the apprenticeship or training program and agreement to the council.

(d) If the supervisor deems it necessary to recommend cancellation of an apprenticeship or training program, he shall do so in writing to each council member, stating in detail the reasons for his recommendation. A copy of said recommendation shall be mailed to the last known address of each member of the committee administering said program, or to those persons responsible for said program, together with notice that the council shall consider the recommendation at its next regularly scheduled meeting more than 30 days subsequent to the date of the recommendation and that all interested

persons may present evidence or testimony regarding said recommendation. the council shall decide the question before it upon majority vote of the members present and voting and shall notify all interested parties of its decision, together with the reasons for it, in writing.

(e) The cancellation of any program or agreement shall automatically effect a cancellation of any agreement registered thereunder, provided that any organization or firm not responsible for the violations causing the cancellation may petition the council for approval of such canceled agreement or program as a new program.

(f) Certificates of completion shall be issued at the request of the appropriate committee. An affidavit of the secretary of the committee concerned shall accompany the request, which affidavit shall state that the apprentice has successfully completed the apprenticeship program of that committee, and that he has been an active, registered participant of that committee's program for at least six months.